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Nos. 88-1150, 88-1194, & 88-1228

In The

Supreme Court of the United States

October Term, 1988

State of Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

Icelean Clark, et al.,
Petitioners,

v.

Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers respectfully move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief and brief amici curae. In support of this motion, the movants state:

1. The amicus National Taxpayers Union is a nonprofit, nonpartisan membership organization. It is dedicated to protecting the interests of federal, state and local taxpayers and functions through lobbying, public education and litigation.

2. The amicus National Association of Manufacturers is a voluntary business association of approximately 13,500 companies and subsidaries. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM represents its constituency on public policy issues, including tax matters, at the Congressional level.

3. The amici have received the consent of all Petitioners, to wit, the State of Missouri, et. al., Icelean Clark, et.al., and Jackson, County, Missouri, et. al. Copies of these consents have been filed with the Clerk of the Court.

4. The Respondants, Kalima Jenkins, et. al., School District of Kansas City, Missouri, et al. and American Federation of Teachers, Local 691 refused consent to the filing of this brief.

5. This motion and the accompanying brief are timely filed.

6. The annexed brief amici curiae emphasizes special matters concerning the issues raised by the District Court's order relating to the area of taxation in which the amici have a special interest and expertise, which may be of assistance to the Court in its deliberations on the above captioned Petitions for Certiorari.

For the foregoing reasons National Taxpayers Union and National Association of Manufacturers request that their Motion for Leave to File the annexed brief be granted.

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BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers submit this brief as Amici Curiae in Support of the Petitions for Certiorari filed in the above-captioned actions. All three Petitions challenge the decision of the Eighth Circuit Court of Appeals in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).

INTEREST OF THE AMICI

The amici curiae are concerned about the dangers presented by judicially imposed taxes. If a court can unilaterally impose a tax, the ability of citizens to control taxation (either by direct vote or through their elected representatives) is impaired. Like our nation's founders, the amici oppose taxation without representation.

The amici do not seek to comment upon the merits of the other elements of the district court's remedy. The amici's position is based upon a commitment to democratic participation in taxation decisions, and emphatically not upon any opposition to racial integration.

The National Taxpayers Union (NTU) was founded as a citizens' lobby by concerned taxpayers in 1969. It is a nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all fifty states, the NTU represents over 150,000 taxpayers. NTU seeks to preserve the integrity of the political process by which taxes are imposed. If the Eighth Circuit decision is allowed to stand, the voice of citizens and their elected representatives in determining the level of taxation will be diminished, to the detriment of NTU's members.

The National Association of Manufacturers (NAM) of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM's members are located in every state of the nation and are subject to a myriad of federal, state, and local taxes. NAM's policy states that "tax rates, deductions, credits and expenses should be continued to be established by statute." The NAM believes it is improper for a federal judge to ignore the tenets of taxation embodied in the Constitution and past taxing legislation. The precedential effect of this type of judicial action has far reaching implications for the NAM and its constituency, not to mention the electorate as a whole. Such a "remedy" could directly affect NAM's membership in areas beyond this case.

QUESTIONS PRESENTED

Does a federal court's broad equitable power to remedy constitutional violations permit it to order a specific increase in a tax?

In remedying a constitutional violation, may a federal court impose a tax in a manner that contradicts a voter-approved state constitutional provision limiting taxation?

SUMMARY OF ARGUMENT

Conflicts exist both between the circuits and between established lines of this Court's precedent regarding a court's ability to impose taxes. The power to impose a tax has been declared outside the normal boundaries of judicial action, yet other precendent implies that this power may be used to remedy constitutional violations. The circuit courts have differed radically in interpreting this Court's conflicting guidance. While several circuits have flatly rejected a judicial taxing power, others have exhibited uncertainty about their authority, and the Eighth Circuit has explicitly endorsed judicial taxation. Given this confusion, this Court should grant certiorari to clarify whether this extraordinary power exists.

ARGUMENT

I. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN TWO IMPORTANT LINES OF CASES

The federal district court below ordered remedies for constitutional violations involving public school desegregation. The court ordered the defendant county to increase property taxes from $2.05 to $4 per $100 of assessed valuation to finance implementation of the remedies. The court of appeals upheld the imposition of the tax.[1]

The Eighth Circuit's decision in this matter marks the convergence of two significant lines of cases. One line of authority, stretching far back in American history, holds that it is beyond the power of the judiciary to unilaterally impose taxes, no matter how compelling the demand for governmental funding. The other line of cases is characterized by the

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[1]The court rejected another district court order imposing a state income tax surcharge.

exercise of broad equitable powers by the courts to remedy various constitutional violations. The fundamental issue raised by the Petitions for Certiorari is whether these remedies may extend to ordering local governments to impose specific tax increases.

A. JUDICIAL DECISIONS HAVE HELD THAT IT IS BEYOND THE POWER OF THE FEDERAL JUDICIARY TO ORDER STATES AND LOCALITIES TO IMPOSE A TAX

The Supreme Court dealt extensively and consistently with the judicial power to impose taxes in a line of cases beginning in the 1870's. The Court has been concerned with both preserving the boundary between the legislature and judiciary in matters of taxation as well as respecting the independent spheres of state autonomy. There can be little doubt of the constancy with which the Court has maintained its holding that taxation is a sovereign legislative act. A few samples of judicial and scholarly views will suffice to demonstrate the strength of this belief:

1788

"The judiciary . . . has no influence over either the sword or the purse . . ." The Federalist No. 78 (Hamilton).

1874

"It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. *Heine v. Levee Commissioners*, 86 U.S. (19 Wall.) 655, 661 (1874).

1880

"The power of taxation is legislative and cannot be exercised other than under the authority of the Legislature." *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880).

1899

"[I]f the legislature omits any property from the list of taxables the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation." *New Orleans v. Stempel*, 175 U.S. 309, 313 (1899).

1924

"It has been said that 'the courts have no more power to assess, or

command the assessment of taxes, than the legislature has to adjudge or command the adjudication of law suits.'" T. Cooley, The Law of Taxation § 68 (4th ed. 1924).

1961

"Federal courts may not assess or levy taxes. Only the appropriate taxing officials . . . may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961).

The opposition of the Court to judicial taxation was most dramatically illustrated in the case of *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873). The city issued bonds to build a railroad. After the railroad was built, the city refused to pay the bonds. Plaintiff, a bondholder, had secured a judgment against the city, and obtained a writ of mandamus from a lower court ordering the city to collect a tax to pay his judgment. The city aldermen, however, kept resigning instead of performing the asserted duty. The Supreme Court found that the theories upon which the city's defense rested were "vicious" and that the city was blatantly refusing to pay an honest debt. Nevertheless the Court held that the judiciary does not have the power to order that a tax be levied. The Court stated, "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments." 86 U.S. at 116.

Federal courts play a legitimate role in overseeing state and local taxation. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 109 S. Ct. 633 (1989). The role is uniquely judicial, and is circumscribed by principles of comity. See *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981). The courts assure that state taxes do not violate federal constitutional requirements applicable to taxation. Appropriate concerns are, for example, that taxation by the states meets the requirements of equal protection and that it does not unduly burden interstate commerce. The judiciary's role does not, however, enter into the legislative arena to exercise the taxing power. This distinction--between judicial action that restrains state taxation within constitutional bounds and legislative exercise of the taxing power--is crucial.

B. JUDICIAL DECISIONS HAVE RECOGNIZED BROAD EQUITABLE POWERS TO IMPOSE REFORMS REQUIRING EXTENSIVE PUBLIC EXPENDITURES

Another line of cases has endorsed a more active role for the judiciary. This Court has repeatedly emphasized the wide range of discretion available to district courts in formulating effective remedies. To remedy constitutional violations, primarily involving school desegregation and prison conditions, the courts have entered injunctive orders that require extensive public expenditures.

More that 600 school districts have been controlled significantly by federal judges. Nagel, Controlling the Structural Injunction, 7 Harvard Journal of Law and Public Policy 395, 396 (1984). Courts have become involved in overseeing all facets of public school administration, "from broad policies governing entire school systems to narrow regulation governing school conduct." Fluckinger, The Changing Relationships of the Judiciary to the Policy and Administrative Processes of Government, 1985 Brigham Young Univ. L. Rev. 671, 677. Court-ordered desegregation has involved the expenditure of hundreds of millions, or perhaps even billions of dollars nationwide.

Similar pervasive judicial authority has been exercised in assuring adequate prison facilities. Judges have ordered reforms in most states; there are decrees affecting 270 local jails.[2] "Local officials have been ordered to do everything from hiring dozens of guards and other workers and building new, or substantially altering old, facilities, to appointing a prison ombudsman and creating a Department of Detention and Correction." *Rhem v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974) (citations omitted). See also Fluckinger, *supra*, at 689-91. This Court noted that many courts "have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

The basic principle developed by the courts is that remedies for these types of constitutional violations are equitable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

The remedial task is to correct, by a balancing of the individual

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[2]Nagel, *supra*, at 396. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Rhodes v. Chapman*, 452 U.S. 337 (1981).

and collective interests, the condition that offends the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S. at 15; see also *Milliken v. Bradley*, 433 U.S. 267 (1977). "Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise 'realistically to work *now*.'" 433 U.S. at 280 n. 15 (emphasis in original). Proposed remedies must be assessed in light of the circumstances present and the options available in each instance. *Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

The limits on equitable power have remained amorphous. Certain dicta in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), seemed to indicate that a court may order local officials to exercise their power to levy taxes. 377 U.S. at 233. This decision is discussed extensively in the Petitions for Writ of Certiorari of the State of Missouri, et al., No. 88-1150, at 24, and of Icelean Clark, et al., No. 88-1194, at 17-23. The Court did not specify that the district court would itself be authorized to set particular tax levels or methods of collection. Although the Court did not spell out the details, it apparently contemplated that such decisions would be made by elected officials. The *Griffin* decision is at the root of lower courts' misguided attempts to extend the federal equitable remedy to include specific judicially ordered taxation. It was in reliance on *Griffin* that the Eighth Circuit imposed a tax in the case below.

C. THE COURT SHOULD RESOLVE THE CONFLICT IN ITS AUTHORITY BY HOLDING THAT THE FEDERAL POWER TO ORDER EQUITABLE REMEDIES DOES NOT EXTEND TO IMPOSING TAXES

Equity is an awesome power which functions outside the confines of ordinary law. The historical secret of the continued vitality of equity has been that equity judges have used the power with extreme circumspection. Thusly used, it has been a powerful tool in bringing fairness and sensible remedies into areas which the law could reach only with difficulty. However, extending the reach of the equitable remedy into the area of judicial taxation has crossed the boundary into areas where equity should not be extended. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb v.*

Chavis, 403 U.S. 124, 161 (1971).

The Court explained its reluctance to exercise the taxing power in *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873), and reflected exactly the concern of the amici. "In seeking to obtain for the plaintiff his just rights," the Court held, "we must be careful not to invade the rights of others." 86 U.S. at 119. The concern here is likewise that the vindication of rights for some people should not trample upon the rights of others. No matter how compelling the case for remedying constitutional violations,[3] the Court is not empowered to void a basic fundamental of our constitutional system: the ability of the people to be represented in the decision to impose taxes.

II. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN THE CIRCUITS

The Courts of Appeal have differed considerably in the course they have navigated between this Court's conflicting lines of authority described above.

A. THE EIGHTH CIRCUIT HAS ORDERED THE IMPOSITION OF TAXES TO REMEDY DISCRIMINATION

The Eighth Circuit Court of Appeals is the first appellate court to order a governmental unit to increase particular taxes to finance the implementation of a desegregation plan.[4] Other circuits have grappled with similar circumstances of unconstitutional discrimination in education. These circuits have mandated extensive remedial actions, but no other circuit has interjected itself into the position of tax collector.

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[3]See *Meriwether v. Garrett*, 102 U.S. 472, 518 (1880) (J. Field, concurring). ("However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the federal court, it cannot seize the power which belongs to the legislative department of the state and wield it in their behalf.")

[4]In addition to the decision below, the Eighth Circuit addressed this issue in *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), cert. denied, 423 U.S. 951 (1975); and *Liddell v. State of Missouri*, 731 F.2d 1294, (8th Cir. 1984).

This case is particularly troubling to the amici because the district court's opinion disregarded both state constitutional limits on taxation and the will of the electorate expressed through several popular votes.[5] The Missouri Constitution requires approval of two-thirds of voters to increase a tax levy above specified levels. Missouri Const. art. X, § 11 (c). Two citizen-initiated provisions also limit the legislative authority to raise property taxes. Appendix to Petition for Writ of Certiorari of Clark, et al., in No. 88-1194 at A36. [Hereinafter cited as App. at ___.]

The Eighth Circuit decision would negate these limitations on the taxing power of Missouri government. It authorizes the district court to enjoin state and county authorities from applying these measures to reduce the levy below an amount requested by the school board.

Missouri's tax limitation measures were motivated by fiscal concerns. They were not intended to be discriminatory, and they in fact operated neutrally.[6] The Eighth Circuit explicitly rejected a suggestion that judicial remedial powers to raise taxes can appropriately be exercised only where the state limitations are intended to hamper integration.

> "[W]e must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which . . . the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order."

App. at A39. Given this explicit determination, this case presents a clear opportunity for resolving uncertainties about the federal judiciary's power to affirmatively exercise the state's taxing power in a manner not contemplated by state law. It also presents a clear opportunity to refine the relationship of federal remedial power and state legislative power.

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[5]The amici support the argument by Petitioners Icelean Clark, et al., that taxpayers should have been provided an opportunity to intervene when it became apparent late in the judicial process that their interests would be adversely affected.

[6]The Eighth Circuit noted that "there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders." App. at A39.

B. OTHER CIRCUITS HAVE, SO FAR, REFRAINED FROM ORDERING STATE OR LOCAL TAX INCREASES

The other circuit courts have rejected attempts to impose judicial taxation, although some rulings have indicated confusion about this Court's ruling in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). See Annot., 76 A.L.R. Fed. 504. The Seventh Circuit upheld a district court ruling allocating to the state a portion of the costs of a desegregation plan. *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185, 1186 (7th Cir. 1982), citing *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 289-90 (1977). It took pains to clarify that it was not stepping into a taxing role appropriately left to the legislature.

> "The district court has not attempted to restructure state or local taxation. It has neither established tax rates nor mandated a particular method of determining tax rates. The district court has only forbidden the state from shirking its responsibility for the costs of remedying its wrongdoing."

677 F.2d at 1188. The Court of Appeals pointed out that the state legislature would retain its authority over school financing subject only to the requirement that it adequately support the desegregation plan.

> "The court's order does not limit the power of the General Assembly to reallocate state funds for all functions of state government, including the general support of local public schools, in light of the court-ordered obligations. The General Assembly may reduce appropriations to public schools generally, reallocate appropriations for other governmental functions, or raise taxes. It is not the province of a federal court to instruct the legislature on how it should finance its obligations to do so."[7]

The Second Circuit grappled with judicial exercise of the taxing

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[7]677 F.2d at 1190. Judge Posner, dissenting from the court's decision, would have circumscribed the court's role even more. "The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction." 677 F.2d at 1192 (J. Posner, dissenting).

power in *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974). Although finding prison conditions to be unconstitutionally deficient, the court noted that it could not require voters to make available the resources needed by public officials to meet constitutional standards. The *Rhem* court decided it was better for the district court to issue an order to close the prison, rather than direct the city to raise and allocate large sums of money, which would be a step "traditionally left to appropriate executive and legislative bodies responsible to the voters." 507 F.2d at 341.

> "[I]n order to build a new jail, the public must provide additional funds. This Court has no power whatsoever to require the public to do so. Under our system of government, the ultimate source of power is the people. The people have not given this Court any taxing power, or any control over their use of the taxing power."[8]

The district court in *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), was directed by the Fifth Circuit to modify its permanent injunction to delete a provision requiring a school board to apply for federal aid programs. The Fifth Circuit read this Court's decesion in *Griffin* as allowing a district court to require a school system to levy taxes. 415 F.2d at 833. But seemingly uncomfortable with this conclusion, the *Plaquemines* court confined *Griffin* to its unusually extreme facts. The provision at issue was found to go beyond *Griffin* "as to source, manner and controls accompanying the funds." 415 F.2d at 833. The Third Circuit reached a similar conclusion in *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), holding that a lower court had not given adequate deference to the state's decisions about taxation.

The Eighth Circuit stands alone in actually upholding a judicially imposed tax increase. However, it is a fact that we live in an era of fiscal limitation. Seemingly intractable demands for spending are colliding with immovable limits on funds. This is particularly true in the area of education. It is also true in the area of prisons. In the future, the inadequacies of existing local financing may figure in spending for the handicapped or on public housing projects, or in determining local government liability for hazardous waste cleanups. When faced with insufficient government funds to finance court-ordered projects, courts may

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[8]*Id.* (quoting *Jones v. Wittenberg*, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). *See also Reece v. Gragg*, 650 F. Supp. 1297 (D. Kan. 1986).

look to the Eighth Circuit precedent. The role of judicial taxation threatens to increase as the courts grapple with difficult financial issues.

III. BY GRANTING CERTIORARI THE COURT CAN PROTECT THE LEGITIMATE LEGISLATIVE POWERS OF THE STATES AND THE ABILITY OF CITIZENS TO ULTIMATELY CONTROL TAXATION

Judicial imposition of taxes raises a number of complications about which the amici are concerned. Judicially imposed taxes are essentially standardless. Would courts be bound by citizen-initiated tax limitation measures? Must the same procedural safeguards for taxpayers be adhered to in judicially imposed taxes? How would the judiciary determine which taxing mechanism to utilize, and thereby select those upon whom the burden of taxation will fall?

The tendency of judicial taxation is to increase overall burdens on taxpayers. It deprives officials of the ability to decrease other expenditures in order to fund court-ordered remedies. Elected officials, faced with expensive court-ordered remedial measures, could opt to cut other governmental expenditures rather than increase taxes. Judicial taxation usurps the legitimate legislative powers of the states to allocate taxes among various classes of taxpayers or forms of taxation. The judiciary has little ability or right to weigh competing requests for public funds.

Judicial involvement in setting taxes presents the danger of stifling legitimate citizen opposition to tax increases. From the judicial perspective, "Opposition to an injunction that is thought to be enforcing some 'constitutional' requirement naturally seems illegitimate."[9] Vague orders have, in the past, been issued punishing elected officials for unfavorable votes or limiting the activities of opponents to judicially ordered plans.[10]

Judicial imposition of taxes presents particularly difficult questions

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[9]Nagel, *supra*, at 405.

[10]See cases cited in Nagel, *supra*, at 405; Comment, Community Resistance to School Desegregation: Enjoining the Undefinable Class, 44 U. Chicago L. Rev. 111, 147 (1976). See, e.g., *United States v. City of Yonkers*, 856 F. 2d 444 (2d Cir. 1988), *cert. granted sub nom. Longo v. United States*, No. 88-870.

in those situations where, as here, state law requires voters to ratify tax increases. The Missouri tax limitation measures represent an important statement by the people of Missouri about the power of government over citizens. The Eighth Circuit's rationale would increase the absolute size and power of government vis-a-vis citizens.

An active judicial role in setting tax policy threatens to diminish respect for the courts as objective arbiters. The routine use of judicial power to resolve difficult social problems weakens the democratic process. It removes from the public and elected officials the ability to forge important policies and political compromises. Major court decisions are not "forced through the sieve of trade-offs that take place in the legislative arena . . .". Greanias & Windsor, Is Judicial Restraint Possible in an Administrative Society?, 64 Judicature 400, 407 (1981). The elementary principles of separation of powers and federalism inherent in American government prescribe a limited role for the federal judiciary.

CONCLUSION

For the foregoing reasons, the amici urge this Court to grant the Petitions for Certiorari to the United States Court of Appeals for the Eighth Circuit of the State of Missouri, Jackson County, Missouri, and Icelean Clark, et al.

Respectfully submitted,

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